

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case Nos. 08-13555(JMP); 08-01420(JMP)(SIPA)

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In the Matter of:

LEHMAN BROTHERS HOLDINGS INC., et al.

Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.

Debtor.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

March 11, 2010

2:12 PM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

VERITEXT REPORTING COMPANY

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HEARING re Examiner's Motion to Clarify Orders

HEARING re Examiner's Motion to Establish Procedures to Unseal  
the Examiner's Report

Transcribed by: Lisa Bar-Leib

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A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP

Attorneys for Debtor and Debtors-in-Possession

767 Fifth Avenue

New York, NY 10153

BY: HARVEY R. MILLER, ESQ.

SHAI Y. WEISMAN, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY LLP

Attorneys for Official Committee of Unsecured Creditors

One Chase Manhattan Plaza

New York, NY 10005

BY: EVAN R. FLECK, ESQ.

HUGHES HUBBARD & REED LLP

Attorneys for SIPA Trustee

One Battery Park Place

New York, NY 10004

BY: SARAH LOOMIS CAVE, ESQ.

JAMES B. KOBAC JR., ESQ.

JENNER & BLOCK LLP

Attorneys for Examiner, Anton R. Valukas

353 North Clark Street

Chicago, IL 60654

BY: ANTON R. VALUKAS, ESQ.

DANIEL R. MURRAY, ESQ.

JENNER & BLOCK LLP

Attorneys for Examiner, Anton R. Valukas

330 North Wabash Avenue

Chicago, IL 60611

BY: ROBERT L. BYMAN, ESQ.

JENNER & BLOCK LLP

Attorneys for Examiner, Anton R. Valukas

919 Third Avenue

37th Floor

New York, NY 10022

BY: PATRICK J. TROSTLE, ESQ.

HEATHER R. MCARN, ESQ.

1  
2 UNITED STATES DEPARTMENT OF JUSTICE

3 Office of the U.S. Trustee

4 33 Whitehall Street

5 21st Floor

6 New York, NY 10004

7  
8 BY: ELIZABETH G. GASPARINI, ESQ.

9  
10 LOWENSTEIN SANDLER PC

11 Attorneys for the Lead Plaintiffs

12 1251 Avenue of the Americas

13 New York, NY 10020

14  
15 BY: MICHAEL S. ETKIN, ESQ.

16  
17 KRAMER LEVIN NAFTALIS & FRANKEL LLP

18 Attorneys for CME Group

19 1177 Avenue of the Americas

20 New York, NY 10036

21  
22 BY: ELISE SCHERR FREJKA, ESQ.

23  
24  
25  
VERITEXT REPORTING COMPANY

212-267-6868

516-608-2400

1  
2 BLOOMBERG NEWS

3 Attorneys for Global Media Counsel

4 731 Lexington Avenue

5 New York, NY 10022

6  
7 BY: CHARLES J. GLASSER, JR., ESQ.

8  
9 FELDERSTEIN FITZGERALD WILLOUGHBY & PASCUZZI LLP

10 Attorneys for CALPERS

11 The Wells Fargo Center

12 400 Capital Mall

13 Suite 1450

14 Sacramento, CA 95814

15  
16 BY: HOLLY A. ESTIOKO, ESQ.

17 STEVEN H. FELDERSTEIN, ESQ.

18 (TELEPHONICALLY)  
19  
20  
21  
22  
23  
24  
25

1  
2 STUTMAN TREISTER & GLATT LLP

3 Attorneys for Perry Capital

4 1901 Avenue of the Stars

5 12th Floor

6 Los Angeles, CA 90067

7  
8 BY: MARINA FINEMAN, ESQ.

9 ISAAC PACHULSKI, ESQ.

10 (TELEPHONICALLY)

11  
12 CHAPMAN & CUTLER LLP

13 Attorneys for U.S. Bank

14 111 West Monroe Street

15 Chicago, IL 60603

16  
17 BY: JAMES HEISER, ESQ.

18 FRANKLIN H. TOP III, ESQ.

19 (TELEPHONICALLY)

ALSTON & BIRD LLP

Attorneys for Azora Bank

One Atlantic Center

1201 West Peachtree Street

Atlanta, GA 30309

BY: WILLIAM S. SUGDEN, ESQ.

(TELEPHONICALLY)



1 P R O C E E D I N G S

2 THE COURT: Please be seated. Good afternoon.

3 MR. VALUKAS: Good afternoon, Your Honor.

4 THE COURT: I apologize for the delay. I was  
5 involved in a chambers conference with certain parties to the  
6 case. Mr. Valukas, do you wish to be heard?

7 MR. VALUKAS: Thank you, Your Honor. I do. Your  
8 Honor, we have two matters up today. And one is a motion to  
9 clarify and the other is the process and procedure for  
10 unsealing the report which we filed under seal on February 8th  
11 with the court.

12 As to the motion to clarify, Your Honor, that motion  
13 may be moot depending on the Court's action in connection with  
14 the second matter. The motion was precipitated by the fact  
15 that we have been, pursuant to the Court's order, cooperating  
16 with the United States Attorneys Offices and the SEC throughout  
17 this investigation. When we filed a sealing order, the sealing  
18 order itself specifically prohibited the disclosure what was in  
19 the report. So there was this issue as to whether or not we  
20 could provide the filed copy to the U.S. Attorneys Office.  
21 We've spoken to them today. In the event that the order which  
22 we propose today which unseals the document with certain  
23 limited redactions -- as far as they're concerned at this  
24 point, they would be satisfied with that. So we could put that  
25 aside and come back to it after we've dealt with the other.

1 THE COURT: Fine. Let's shelve it for the time  
2 being.

3 MR. VALUKAS: All right. Your Honor, what we have  
4 done since February 8th is we've spoken to all of the parties  
5 who provided us confidential information pursuant to their  
6 agreements as we went along. And I need to say this on the  
7 record. The cooperation that we received from the parties was  
8 extraordinary. This report would have taken -- I've been  
9 through civil litigation for a long time. This would have  
10 taken years to get done if we hadn't gotten the type of  
11 cooperation that we got from everybody including the debtors  
12 here.

13 Everybody provided understanding there were the  
14 confidentiality agreements. We've gone back to them. And as  
15 to the report itself, that is the document which was filed with  
16 you, everybody has agreed with, save two parties, to -- oh, one  
17 party. I'm sorry -- to the unsealing of the report as it  
18 presently is situated. Now, what we have agreed to with  
19 several of the other parties is to redact a limited amount of  
20 information which is personal information and is not part or  
21 essential to the report but which we understood would be  
22 private -- count numbers, things such as that which really have  
23 no relevance to the report itself.

24 So what we would propose in the first instance is --  
25 and we've made some clerical corrections as usual. We go back

1 2200 pages; we did find typos -- is that we file -- be  
2 permitted to file a corrected copy of the report with those  
3 limited redactions and the corrections and substitute that  
4 report for the report which is presently under seal with the  
5 court. And this report would remain under seal until we've  
6 completed everything else. So that would be the first item we  
7 would be asking for.

8 As to the issue of redactions within the report  
9 itself, the CME has posed an objection to our citation to five  
10 documents which are contained within the report which affect  
11 about seven or eight -- about twelve pages of the report. And  
12 we have not reached agreement with them. We have reached an  
13 agreement to put the matter before the Court at a subsequent  
14 time; we have dates for that.

15 What we would propose -- and that matter is of  
16 importance to us because that involves what might be potential  
17 claims by the debtor in connection with the documents which are  
18 sought to be maintained as confidential. So we can't reach a  
19 resolution on that particular area.

20 What we would propose then is that we would file  
21 today a redacted copy of the report excluding these five  
22 documents and the references to the material in those five  
23 documents. We have that prepared. If the Court enters the  
24 order, we can have that -- then the report -- the 2200 page  
25 report would then be available to the public. We could have

1 that on the Court's electronics file and on Eclipse within  
2 thirty minutes after the Court filed the order so the document  
3 would be out.

4 We would then propose that, when we have dates that  
5 we have agreements with the CME, if this works for the Court,  
6 that the CME would file its objection by the 19th of March. We  
7 would respond by the 25th and any other party who wanted to  
8 respond. And a hearing any time after April 1st on that  
9 matter. And we've spoken with the CME before we came here and  
10 they were agreeable to those dates if those are dates that are  
11 agreeable to the Court.

12 THE COURT: Okay. I mean, the key dates that don't  
13 affect me are the dates of March 19th and March 25. And I  
14 simply have to check with my courtroom deputy to see what  
15 available time we have --

16 MR. VALUKAS: I'm sorry?

17 THE COURT: Sorry about the background noise. The  
18 only dates that affect you have been agreed to. They don't  
19 affect me.

20 MR. VALUKAS: Okay.

21 THE COURT: The one date that affects me which I  
22 can't give you yet is the date for the hearing itself. It  
23 seems to me that it would be reasonable for the hearing to take  
24 place on a Lehman omnibus hearing date --

25 MR. VALUKAS: That's fine.

1 THE COURT: -- because for the efficiency of the  
2 administration of the case as a whole and also to minimize the  
3 number of interested lawyers who might be wanting to watch that  
4 the next omnibus hearing date in April is the 14th. So why  
5 don't we call this April 14th?

6 MR. VALUKAS: That works.

7 THE COURT: And just judging from the number of  
8 people who are here today, I'll probably arrange for an  
9 overflow courtroom on that day so we have some capacity for any  
10 people who simply want to observe.

11 MR. VALUKAS: Okay. The other --

12 THE COURT: There are some more blanks, though --

13 MR. VALUKAS: Yes. And we're going to come to those.

14 THE COURT: -- in paragraph 3 of your proposed order.

15 MR. VALUKAS: Right. Your Honor, as we stated the  
16 last time I was before the Court and what we have stated in our  
17 motion, we believe that our responsibility was not only to  
18 write a report but to provide the facts so that the parties  
19 could use those facts hopefully for purposes of resolving the  
20 matters which are before your court in this incredibly complex  
21 case.

22 There are over 8,000 footnotes in the report and they  
23 reference several thousands of documents. We have gone back to  
24 the parties and -- because our proposal to the parties was that  
25 we would arrange a hyperlink so that a person reading the

1 report could then access the actual documents to which the  
2 reference was being made in the report.

3 THE COURT: I'd like access to that, too.

4 MR. VALUKAS: Well, Your Honor, you have access to  
5 anything you want.

6 THE COURT: Okay. I'm saying -- and this is an aside  
7 on my part. But I have read -- I can't say every single one of  
8 the 2200 pages because some I've skimmed. But I consider this  
9 to be one of the most extraordinary pieces of work product I  
10 have ever encountered. It's extraordinarily comprehensive. It  
11 reads like a best seller. And it's so well organized that it's  
12 actually useful. So my compliments --

13 MR. VALUKAS: Your Honor, that --

14 THE COURT: My compliments to everyone who had any  
15 meaningful input in what I consider the most outstanding piece  
16 of work product ever produced by an examiner.

17 MR. VALUKAS: Thank you very much, Your Honor. I  
18 can't tell you how much that means to me and the lawyers over  
19 here. So that's -- that's what we thought we hoped we could do  
20 because this was a matter of great significance across the  
21 country and we wanted to rise to the occasion.

22 What we have had with regard to our request of the  
23 various parties is the following. Two parties -- and I need to  
24 make this clear. We don't see this as an objection so much as  
25 something that needs to be worked out. Two parties have

1 objected to the publication of some of the documents which they  
2 have provided to us. Barclays, which has been extraordinarily  
3 cooperative with us and we could not have written the report  
4 without their cooperation, gave us access to their databases so  
5 that our experts could review things such as valuations matters  
6 such as that. But that material is also intertwined with  
7 Barclays' proprietary material since -- after they have taken  
8 over Lehman. They have not been given the opportunity to read  
9 the report. The only copies that have been provided to anybody  
10 have been provided to the Court. They want to read the report  
11 to make sure that if they say yes in terms of the access point  
12 that that will not impact proprietary information. And they've  
13 indicated if they can have two weeks to do that that they would  
14 be back here -- we may have all matters resolved or we may have  
15 to make some modifications in the report. The only other party  
16 is the Office of Thrift Supervision which has indicated to us  
17 that they have no objection to the report being published as it  
18 presently is identified which has extracts from certain  
19 portions of their report but, for policy reasons, would object  
20 to the publication of the underlying documents which are  
21 typically held as confidential.

22 So both of those parties have indicated an objection  
23 of form. They have agreed -- or we have had agreements with  
24 Barclay. We really haven't talked with the Office of Thrift  
25 Supervision. But if with regard to that, if we would set a

1 date for them to file whatever objections those two parties  
2 would have -- all other parties have agreed and we're going to  
3 bind them to their agreement -- of March 25th with a response  
4 by us by April 1st. And then that matter could be set over --  
5 and you've suggested the date of the 14th and it seems to me we  
6 could deal with both those issues on the 14th if they, in fact,  
7 still exist as of that time.

8 THE COURT: My only comment with regard to the 14th  
9 is that if it turns out that there is significant contested  
10 litigation regarding confidentiality privilege and disclosure  
11 issues, given that that's an omnibus hearing date of unknown  
12 dimension at this point, it's conceivable that there may be a  
13 need to break this out into a separate hearing date. And I'm  
14 simply going to reserve the right to do that. But for purposes  
15 of the order, we're going to treat this as an April 14th  
16 hearing with the understanding that it's subject to reasonable  
17 adjustment so that we don't end up with an unmanageable  
18 calendar that day.

19 MR. VALUKAS: And what we will do is talk to the  
20 parties. If we can work around these issues and find a way to  
21 do that without impacting in any way the integrity of the  
22 report, we may still get agreement. As I said, the agreements  
23 and cooperation of the parties -- and this has been  
24 unprecedented.

25 That would then leave us, Your Honor, with one last



1 item which is not subject to an order but I would put before  
2 the Court and we will deal with it at some later date. And  
3 that is this. We have created in the course of this  
4 investigation a repository, document repository, which has been  
5 organized in such a way that it's readily accessible through  
6 search terms, documents, events, numerous different ways that  
7 litigators would look at a repository for purpose of putting  
8 together. There are probably thirty-five million pages in the  
9 documents which we reviewed. Over six million documents --  
10 they've been analyzed. The analysis is -- in the  
11 categorization is included there. At some point, we want to  
12 come back to the Court. We want to talk to the parties 'cause  
13 all of these documents are subject to confidentiality  
14 agreements. And possibly have a proposal to the Court as to  
15 how the Court might think to address the issues of access to  
16 those materials. That may not be possible on a -- other than  
17 on an item by item basis 'cause the parties who produced the  
18 materials did so with the strict understanding and agreement  
19 with us that they would not be made available absent their  
20 being heard on the matter and their objections being  
21 considered. So -- but we'll come back on that. I just say  
22 that that's an issue that's outstanding that we need to come  
23 back to the Court on.

24 THE COURT: Okay.

25 MR. VALUKAS: So what we would then propose, Your

1 Honor, is that, pursuant to the order that we have suggested,  
2 that you allow us to substitute a corrected copy which will  
3 continue to be under seal for the copy that we filed on  
4 February 8th. Secondly, that we -- that the dates that we  
5 propose and the Court is indicating might be agreeable for the  
6 hearing dates on the two series of objections be set. Thirdly,  
7 that the Court direct the filing of the redacted copy of the  
8 report which redacts out the CME material subject to the  
9 hearing so that could be immediately made public as of today.

10 THE COURT: It all sounds good to me. I'll ask,  
11 since we have a lot of people in court, if there's anyone who  
12 wishes to be heard.

13 MR. GLASSER: May I approach, Your Honor?

14 THE COURT: Sure.

15 MR. GLASSER: Thank you. May it please the Court,  
16 learned counsel. Charles Glasser, Global Media Counsel for  
17 Bloomberg News. Thank you for the opportunity to be heard.  
18 Make it very brief. We've had the opportunity to review the  
19 proposed order. We're delighted with it, frankly. We do have  
20 one suggestion or, rather, point that we would ask Your Honor  
21 to consider with regard to this order. Less so about the  
22 immediate release of the redacted version today but the  
23 suggestion that serves the public interest and indeed may  
24 represent a savings in judicial efficiency, to wit. If Your  
25 Honor would look at Section 2(d) of the proposed order, this

1 basically, if I understand this all correctly -- we would ask  
2 that Your Honor require CME Group, in this case, who plan to  
3 file an objection or any party that so intends to file, that as  
4 we had suggested in our proposed order that they be required to  
5 file a public version they redact on their own, on good faith,  
6 on the basis upon which they believe material should be  
7 withheld from public view. This may satisfy the public need to  
8 know. It may contain enough facts for reporters and  
9 subsequently the public to learn what they need to learn. It  
10 minimizes further litigation on that point, at least as far as  
11 the press is concerned. And it certainly supports the  
12 principles that have been held in this Court that the policy of  
13 open inspection underscores the confidence and the public  
14 willingness to accept what happens in its courts. In other  
15 words, CME or, again, any groups objecting down the road to  
16 disclosure of their material, would have the opportunity to  
17 protect which it will that, in good faith, they genuinely  
18 believe is a trade secret or personal information, anything  
19 like that, but would allow this method requiring them to file a  
20 public version simultaneously, would also allow the public to  
21 see what the basis of secrecy is. In other words, the public  
22 has a right to know not only what they think might or might not  
23 be a secret but why secrecy? What's the logic behind it? Why  
24 are we, the public, being hidden from the process? It's quite  
25 possible, again, one assumes good faith on the part of all

1 counsel, one assumes that CME would do so on a narrow and  
2 limited basis. And we would ask that Your Honor consider  
3 adding the public version requirement to this upcoming  
4 objection.

5 Incidentally, counsel for Dow Jones is present.  
6 We've discussed this and they also agree that this would serve  
7 judicial efficiency and the public interest.

8 Does Your Honor have any questions or can I be of any  
9 assistance?

10 THE COURT: Not of you but I do want to know if CME  
11 Group is represented here today.

12 MR. GLASSER: Thank you, Your Honor.

13 THE COURT: Is anyone here representing CME Group?

14 MS. FREJKA: Yes, Your Honor. That provision is  
15 acceptable.

16 THE COURT: If you could just come forward, identify  
17 yourself fully for the record and speak into the microphone so  
18 what you say is picked up on the record.

19 MS. FREJKA: Good afternoon, Your Honor. Elise  
20 Frejka, Kramer Levin, represent CME Group. The proposal on a  
21 public filing is acceptable to CME.

22 THE COURT: Okay, fine. So we will amend paragraph  
23 2(d) or, in some other appropriate place in the order, put a  
24 reference to the agreed filing by the CME Group of a public  
25 version of what would otherwise be an under seal document along

1 with an explanation as to the reason for this being a dispute  
2 to litigate.

3 MS. FREJKA: Thank you, Your Honor.

4 THE COURT: Does that satisfy Bloomberg? I would  
5 think it would.

6 MR. GLASSER: It does, Your Honor. Thank you for the  
7 opportunity.

8 THE COURT: All right. Mr. Etkin, do you wish to be  
9 heard as well?

10 MR. ETKIN: Very briefly, Your Honor. Your Honor,  
11 Michael Etkin on behalf of the lead plaintiffs in the three  
12 cases that are pending before Judge Kaplan, the equity debt  
13 securities case, the mortgage back securities case and the  
14 ERISA case, all pending before Judge Kaplan.

15 We filed a short pleading, Your Honor. Our only  
16 concern -- and I just rise to mention it. First of all, we're  
17 very happy and impressed with, frankly, what the examiner has  
18 been able to do with respect to dealing with confidentiality  
19 issues with those producing parties.

20 We're just concerned and want to make sure that, at  
21 the end of the day, as it relates to the litigation that's  
22 pending before Judge Kaplan, to the extent that the examiner  
23 agrees that certain redactions should take place or documents  
24 are not released, that that would not preclude, in the context  
25 of the securities litigation, requests for that information or

1 those documents and, obviously, giving those other parties the  
2 opportunity to come in and take a position with respect to  
3 whether it's privileged or confidentiality and that we're not  
4 barred from dealing with that, if necessary, somewhere down the  
5 road in the context of that litigation.

6 THE COURT: I have a hard time understanding how you  
7 would be but let me see if anybody has a problem with that.

8 MR. ETKIN: It's strange sometimes how parties may  
9 put a document in front of the district court from the  
10 bankruptcy court and take the position that perhaps that issue  
11 had been resolved here for all purposes. So maybe it's belt  
12 and suspenders, Your Honor.

13 THE COURT: All right. Mr. Valukas or others on your  
14 team, is there any issue with respect to preclusive impact? I  
15 would assume the answer is --

16 MR. VALUKAS: No.

17 THE COURT: -- there's no issue of preclusive impact.

18 MR. VALUKAS: There is no issue.

19 THE COURT: Fine. So everybody's rights are  
20 reserved. To the extent that something has been redacted, it  
21 doesn't mean that it has been redacted forever. Is there  
22 anything more on the order? I'll enter it today.

23 MR. VALUKAS: Thank you, Your Honor.

24 UNIDENTIFIED SPEAKER: Your Honor, we have the disk  
25 if --

1 MR. VALUKAS: We have -- is this the order?

2 UNIDENTIFIED SPEAKER: The disk with the order.

3 MR. VALUKAS: This is the disk with the order but,  
4 again, it's been modified to reflect that.

5 THE COURT: You may approach. Now, is -- okay.  
6 Everything is here except for the reference to the CME Group  
7 public filing. And I presume that counsel for CME Group and  
8 counsel for the examiner can stay for a few minutes to  
9 interlineate the order to include acceptable language. And we  
10 can make those changes before the order is entered on the  
11 docket. So I'm just going to suggest that you stay behind to  
12 do that.

13 MR. VALUKAS: We will do exactly that, Your Honor.  
14 Then we would ask that, as I understand the procedure here,  
15 since it might take a day to get it onto the docket that is --  
16 if you've so ordered on the record then we can -- once you've  
17 signed it, we can then proceed to disclose it.

18 THE COURT: I'm so ordering today's record but it's  
19 my contemplation that I'll be able to docket a slightly  
20 modified version of the order you've just handed to me this  
21 afternoon. If it's going to take a little bit of extra time to  
22 substitute the cleaned up March 11th version of the February  
23 8th report with appropriate redactions so that then can be  
24 publicly filed -- I don't know if that's going to happen this  
25 after --

1 MR. VALUKAS: We have it with us.

2 THE COURT: So that can happen this afternoon?

3 MR. VALUKAS: We can have it happen in thirty  
4 minutes.

5 THE COURT: Fine. So I think it should happen before  
6 the close of business today, for sure. Now, as a result of the  
7 disposition of this matter relating to on sealing, I trust the  
8 earlier motion which we put on the shelf has been rendered  
9 moot.

10 MR. VALUKAS: It has, Your Honor.

11 THE COURT: Fine. Is there anything more for today?  
12 Mr. Miller?

13 MR. MILLER: Good afternoon, Your Honor. Harvey  
14 Miller on behalf of the debtors. I just wanted to say, Your  
15 Honor, that we applaud the efforts of the examiner. This is a  
16 day that we have been looking forward to. The unsealing of the  
17 report could not have occurred at a more opportune time, Your  
18 Honor, in this stage of the process. Everybody's looking  
19 forward to reading the report and assisting in the formulation  
20 of a plan that is going to be filed very, very shortly, Your  
21 Honor.

22 The only other question that I want to make clear is  
23 that the copyright on this report belongs to the estate.

24 THE COURT: I now understand what will fund the plan.

25 MR. MILLER: You've got it, sir. Thank you, Your



1 Honor.

2 THE COURT: All right. We're adjourned until March  
3 17th which is the next omnibus hearing. Thank you all.

4 MR. VALUKAS: Thank you, Your Honor.

5 (Whereupon these proceedings were concluded at 2:35 p.m.)  
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I N D E X

R U L I N G S

DESCRIPTION	PAGE	LINE
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C E R T I F I C A T I O N

I, Lisa Bar-Leib, certify that the foregoing transcript is a  
true and accurate record of the proceedings.

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LISA BAR-LEIB

AAERT Certified Electronic Transcriber (CET\*\*D-486)

Veritext

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: March 12, 2010